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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 255

SOL COHEN et al.,

Petitioners,

against

CAULDWELL WINGATE CO., POIRIER & MCLANE CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONERS

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Respondents' Discussion of the Merits

It was the carefully substantiated claim of petitioners in their main brief that the record in this case presents the following question:

> "Where an employer whose operations are both interstate and intrastate in character does not in any way segregate the two or distinguish between them, and where some of his employees regularly perform work which is essential to both types of operations, must each employee prove what proportion of his time was allocable to the interstate phase [in order to secure the protection of the Fair Labor Standards Act]?"

Respondents do not attempt to answer this question in the affirmative. Nor do they attempt to deny that the question is one which this Court should decide. They simply deny that the question is presented.

Respondents support this position by stating that "petitioners * * * have never shown themselves to be in any way connected with possible interstate activities" and that "petitioners kept the time of, or prepared cost cards with respect to, the work of men engaged solely in the new and original construction involved in the camp project" (Respondents' Brief, pp. 7-8). These statements are simply incorrect. The record shows indisputably that the petitioners checked the time of *all* of defendants' employees, including those who were engaged in interstate activity as well as those who were not (Petition and Brief, pp. 2, 9).

Timeliness of the Petition

Respondents have suggested that the petition herein was not timely filed.

In the case of *Gypsy Oil Company* v. *Escoe,* 275 U. S. 498, this Court said (pp. 498-499):

> "The running of the time within which proceedings may be initiated here to bring up a judgment or decree for review is suspended by the seasonable filing of a petition for rehearing. But it begins to run from the date of denial of such petition * * *."

Again in *Department of Banking* v. *Pink,* 317 U. S. 264, a case which arose in the State of New York, the Court said (p. 266):

> "A timely petition for rehearing tolls the running of the three-month period because it operates to suspend the finality of the state court's judgment, pending the court's further determination whether the judgment should be modified * * *".

Obviously the words "seasonable" and "timely" in the above passages refer to the practice of the state court, and have no reference to the three-month period determining the jurisdiction of this Court. Respondents cannot and do not contend that petitioners' motion for reargument in the Court of Appeals was not "seasonable" or "timely" under the rules of that Court. Yet respondents maintain that because the motion for reargument was not made within three months of the original judgment of January 9, 1947, petitioners lost their right to file a petition for certiorari. Clearly this would not be true if the Court of Appeals had ordered reargument and then reaffirmed its original judgment. But respondents argue that, because the Court of Appeals denied the petitioners' motion for reargument, the finality of its earlier judgment was not suspended.

A timely motion for rehearing either suspends the finality of the original judgment, or it does not. Its effect in that respect cannot vary depending on whether or not it was made within three months of the judgment. Yet that is what respondents must contend.

Presumably no question of timeliness could or would have been raised here if the motion for reargument in this case had been made before April 9, 1947, even though the motion had eventually been denied. That would have been so because the motion had operated to "suspend the finality of the state court's judgment" (*Department of Banking* v. *Pink, supra*). We do not understand how respondents can now contend that because the motion was made later, but still "seasonably", it had a lesser effect upon the finality of the original judgment.

Respondents state that, in the circumstances of this case, "it is clear that the Court of Appeals did not 'entertain' petitioners' motion for leave to reargue". How is this "clear"? Do respondents contend that the Court of Appeals dealt differently with the motion because it was made more than three months after the original decision?

It will be noted that the Court of Appeals did not "dismiss" the motion for reargument, but "denied" it after "due deliberation" (R. 149). This was done in spite of the fact that the United States Attorney in his brief to the Court of Appeals opposing the motion for reargument asked that the motion "be dismissed rather than denied so that appellants will be precluded from reviving their time to file a petition for certiorari".

While we do not believe the grounds of the motion for reargument are pertinent here, it may be of interest that the motion was not a purely formal one. The basis for the motion was the fact that, since the original decision of the Court of Appeals, the Circuit Court of Appeals for the Second Circuit had decided the case of *Skidmore* v. *Casale,* 160 F. (2d) 527, which was directly in conflict with it (see our Main Brief, pp. 11-12). Detailed briefs were submitted, dealing primarily with the issues of the applicability of that case to the instant situation.

None of the cases cited by respondents for the proposition that the motion for reargument did not suspend the finality of the original judgment are applicable to the instant situation. In *Department of Banking* v. *Pink,* 317 U. S. 264, a motion to amend the remittitur had been made, and this Court sharply distinguished it from a motion for reargument in the language quoted above (p. 2). In *Pfister* v. *Finance Corp.,* 317 U. S. 144, and *Bowman* v. *Loperena,* 311 U. S. 262, both of which arose out of bankruptcy proceedings, the petitions for rehearing had been filed out of time; and this Court held it to be a controlling circumstance whether or not the petition for rehearing was granted. In *Gypsy Oil Co.* v. *Escoe, supra,* and *Morse* v. *U. S.,* 270 U. S. 151, the Court was dealing with motions for leave to file a motion for rehearing. Needless to say, the motion for reargument in the present case was not a motion for leave to file a motion for reargument. If the Court of Appeals had looked favorably upon the motion for reargument, it would have proceeded forthwith to order a

new oral argument. The fact that it did not do so, but denied the motion for reargument, does not mean that it did not consider the motion on its merits.

Surely it is not the intent of this Court by its rulings to interfere with the jurisdiction and practice of the several state courts. Yet by a holding that the present petition was not timely, this Court would in effect be imposing upon the States a three-month time limit for the filing of motions for reargument. Obviously no litigant would take advantage of a longer period if, by so doing, he would be losing the opportunity to file a petition for certiorari.

Respectfully submitted,

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